NON-CONTENTIOUS JURISDICTION IN GERMANY.

I. Distinction between Contentious and Non-Contentious Jurisdiction.

THE function of the judiciary is to determine the rights of contesting parties. The action of the courts depends, therefore, upon two conditions: there must be a contest between at least two parties; and this contest must concern rights, that is, questions of law. When there is only one party, the court does not act. It may sometimes be of great value in the management of affairs to know what the opinion of the court is, but when there is no controversy with another party the court's opinion cannot be had. Not every contest, however, entitles the contestant to the action of the court; it must be a contest about rights. For instance, A differs with B about the value of a piece of land or a painting, but if there is no question of rights between them they cannot bring the matter before the court. The province of the judiciary is therefore to decide contests about rights, and in deciding these contests to state the law. Apparently there must be a pre-existing right and a pre-existing law before the courts begin to act, and the creation of rights as well as of law is not within the task of the judiciary. Now the question arises, how are rights created and how is the law created?

The law has two sources, customary or common law and statute law. The original source is the customary law formed from the opinion of the people. The statute law given by the legislative power extends today more and more widely in all states, but apparently no statute can be thoroughly complete, there must always be some deficiencies. The courts supply these by way of interpretation and analogy, and might therefore in a given case be regarded as legislators. But in fact they are not legislators, for two reasons: first, the opinion of the court is only given for the special case and has not the character of general law; secondly, the judge in giving his opinion is bound by his conscience and states the law more than he creates it; the legislator, on the other hand, when creating the law is free to follow any course which he may think expedient. Therefore, at least theoretically, the courts cannot be regarded as creating the law.

Nor does the function of the courts consist in the creation of private or individual rights when they decide contests. As private rights exist for the mere benefit of the individual, so their creation seems to be the mere privilege of the individual, and there seems to be no reason for the organs of the state to assist the individual in the creation of these rights.

In fact it is the rule that private persons create their rights; *e.g.*, in making sales, mortgages, and the like. But no state exists where the public authority does not give its assistance in this matter. For instance, a child owning property may become an orphan; the law of the state may say that the next of kin or some other fitting person is entitled to act in the child's behalf. All business done by such person for the child with other persons is of a merely private character, and when contests arise the matter may be brought before the court. But, in fact, in all states the law prescribes that this person cannot act without public authorization, as by an appointment by the orphans' court, or by grant of letters of guardianship. The acts done by him without this authorization are void. And so the state, by granting letters of guardianship and by giving its sanction to certain transactions of the guardian, assists the individuals in creating their rights. Another illustration: somebody dies leaving a will. The carrying out of the provisions of this will is a merely private matter between the heirs and the grantees in the will; when they come in conflict, they of course go before the court. But the law often prescribes that no private rights can be created by this will unless the will has been proved, unless letters of administration have been granted, or other formalities taken. Or somebody wants to sell his property. This matter, although a private affair between the seller and the buyer, needs for its validity in most jurisdictions, at least in regard to third persons, the recording of the act in some register kept by public authority.

The assistance of the public authorities in cases of the character described is necessary to create individual rights. This kind of public action is generally called non-contentious jurisdiction (freiwillige Gerichtsbarkeit). Therefore the expression non-contentious jurisdiction means the assistance of the state or public authorities in the creation of private rights.[1]

[1] *Cf.* Gaupp-Stein, Kommentar zur Civilprozessordnung, 8 ed., 11; Schultze-Görlitz, Kommentar zum Reichsgesetz über die freiwillige Gerichtsbarkeit, 4 *et seq.* The German term *freiwillige Gerichtsbarkeit* has been chosen for the purpose of conven-

The word jurisdiction might perhaps suggest the view that these kinds of public acts are closely connected with the acts of the courts in litigious matters, civil or criminal. In fact, it is not so. The states in assisting the individuals to create their rights exercise merely *administrative functions*, and these functions can be performed as well by administrative officials as by judges. The registration of deeds, for instance, in this country, is mostly done by administrative authorities. And the German law provides that, although the functions of probate or orphans' courts or land registration are performed by judges, the legislatures of the different states are entitled to give these functions to administrative authorities.[1] As a rule, however, the states have charged their judges or some persons endowed with judicial authority, like notaries, to perform the affairs of non-contentious jurisdiction.

There are two reasons accounting for the development of these kinds of legal affairs in the history of the states. First, matters of this character were originally given merely to private individuals. So the family had the responsibility when a child needed a guardian, or an insane person a curator, or where the property of a deceased person had to be administered. Later the state regarded it as its duty to take care of minors, absentees, or to protect the *bona fide* purchaser of real property. For this purpose the state needed fitting officials, and of course it found the judges to have the most ability for the performance of this work on account of their knowledge of the law and their independence of the parties. The second reason why matters of non-contentious jurisdiction are principally performed by judicial officers is owing to the fact that many of these matters have grown out of contentious proceedings; like conveyances of property in the old Roman law,[2] and in the old English common law.[3] When later the procedure before the courts began to be mere formality, and no real contest existed between the interested parties, it was quite natural that the performance of this function should remain in the courts where it had been before.

It may in a given case be difficult to decide whether a question belongs to the contentious or to the non-contentious jurisdiction.

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ience. More correct would be the expression "Nicht streitige Rechtspflege." *Cf.* Nussbaum, — die freiwillige Gerichtsbarkeit, 1 *et seq.*

[1] Statute introducing the Civil Code, art. 147; Land Registration Act, art. 83.

[2] Sohm, Inst., § 12.

[3] Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde, 286.

The appointment of a trustee in bankruptcy proceedings or of a sequestrator in compulsory matters is, of course, always of contentious character, even if there may be only one applicant. On the other hand the appointment of a guardian or an administrator always remains of a non-contentious character, even though there may be disputant parties. But in many cases it is in fact doubtful whether the matter belongs to one or the other jurisdiction, and this question greatly depends upon statutory provisions. Thus Section 1635 of the German Civil Code says: "Where divorce has been granted and both parents have been declared guilty, the mother has the care of the sons under six years of age, and of the daughters; while the father has the care of sons over six years of age. The guardianship court may make a different provision if such provision is required, for special reasons, in the interest of the child." So when the father keeps the son under six years of age, the mother can sue him if he does not deliver over the son; and this suit has to be brought in the superior court (Landgericht) which granted the divorce. When, now, the father thinks that the best interests of the child will be promoted by his remaining with him, the law does not entitle him to raise objections in his defense, but he has to make application to the guardianship court (Amtsgericht) for a decree (matter of non-contentious jurisdiction) that the child may remain with him. Suppose this permission is given and meanwhile the mother has taken possession of the child; the father then has to sue her in the superior court on the basis of the decree given by the guardianship court.

It is apparent from this statement that whether the given matter belongs to the contentious or to the non-contentious jurisdiction greatly depends upon statutory provisions. If there are no statutory provisions in a given case, then the question has to be decided upon principle. The way of non-contentious jurisdiction has to be chosen if rights have to be created with the assistance of the public (judicial) authorities. A contentious jurisdiction is necessary if the pre-existence of the right is already supposed and the right is only to be declared by the court.[1]

II. HISTORICAL REMARKS.

Non-contentious jurisdiction, regarded as a system different from contentious jurisdiction, is of comparatively recent origin.

[1] *Cf.* Gaupp-Stein, Schultze-Görlitz, Nussbaum, *supra.*

As the modern states regard their social duties to the individual more highly than formerly, so they find more occasion to interfere in private affairs than before. The old Roman law shows very few illustrations of non-contentious jurisdiction. One of them is the so-called *in jure cessio* used for different purposes;[1] for instance, as a way of conferring a legal title by means of a fictitious lawsuit before the magistrate. If A wished to transfer his ownership to B, A and B went before the magistrate, B claimed ownership as fictitious plaintiff, A admitted his title as fictitious defendant, and the magistrate gave his award in favor of the transferee. This was originally, of course, a contentious procedure, but later the contest was such a mere formality that the magistrate was in fact acting as an official by whom the conveyance was authenticated. A similar procedure was prescribed for adoption. These illustrations show how matters of contentious character became later non-contentious.

Matters of guardianship have been developed in the Roman law in a different way. The old Roman law did not know any interference of the state in this domain of rights; the next of kin exercised a kind of property right over the orphan. But in 443, by the Lex Atilia, the *praetor urbanus* became entitled to appoint a guardian if there was no natural or testamentary guardian, and by the law of the Roman Empire the appointment of guardians was more and more taken by the state.[2]

The old German law gave the care of minors and orphans to the whole family, called *Sippe*, and the *Sippe* appointed a suitable member of the family as guardian.[3] The power of the state to interfere in matters of guardianship became more general in Germany after the Roman law had been received (sixteenth century). The modern German law has adopted the Roman system of the appointment and control of a guardian by the court. The French law, giving these functions to a family council which is composed of four relations of the minor and the justice of the peace as president, preserves the old functions of the *Sippe*. The German Civil Code provides that in certain exceptional cases a family council may be appointed.

Another matter of non-contentious jurisdiction growing out of the old German law is the registration of real property by the

[1] Sohm, Inst., § 12.

[2] Nussbaum, 85.

[3] Brunner, Grundzüge der deutschen Rechtsgeschichte, § 4.

courts. The Roman law regarded real property as a mere *res*, but in the old German law the opinion prevailed that the community, as such, was entitled to control transactions in real property.[1] So under the oldest form of this transaction the interested parties with their witnesses went to the piece of land in question and made the transfer by solemn act. Later it was not necessary to go to the land, but the transfer had to be made in some public place, — in church or before the court. Finally all transfers had to be made in court, and the judge by his public authority granted the real rights. This is the system prevailing today in Germany.

The first statutory provisions concerning matters of non-contentious jurisdiction were made by the Notaries Act of 1512, and Police Acts of 1548, 1577, concerning matters of guardianship. The single states in Germany thereafter left the development of these matters to the customary law.[2]

Prussia enacted provisions concerning non-contentious jurisdiction in its *corpus iuris Fridericianum*. When the new German Civil Code was prepared, its authors prepared a bill regulating the matters of non-contentious jurisdiction. The statute which has been in force since January 1, 1900 (Reichsgesetz betreffend die Angelegenheiten der freiwilligen Gerichtsbarkeit) has been published, together with the Civil Code and various other statutes. Many matters of more local character have been reserved to the different states, which have enacted statutes; for instance, the Prussian Statute of September 21, 1899 regarding the non-contentious jurisdiction. Another main source of such jurisdiction is the Land Registration Act (Grundbuchordnung) in force since 1900. The German Civil Code contains matters of non-contentious jurisdiction; for instance, concerning the making of wills, certificates of inheritance, and others. Provisions belonging to the non-contentious jurisdiction may also be found in the Commercial Code, in the Trade Mark Statute, and in similar statutes.

III. Jurisdiction and Procedure.

The ordinary jurisdiction in Germany is exercised by four kinds of courts; namely, the district or lower courts (Amtsgerichte), the superior courts (Landgerichte), the courts of appeal (Oberlandesgerichte), and the supreme court (Reichsgericht) in Leipzig.

[1] 1 Gierke, deutsches Privatrecht, 266 *et seq.*

[2] Nussbaum, 7.

When these courts are acting in matters of non-contentious jurisdiction, the same number of judges sit as in civil matters. The district courts give their decisions by single judges; the superior courts by so-called chambers (Kammern) composed of three judges; the courts of appeal by so-called senates (Senate) of five judges; and the supreme court by senates of seven judges. The decrees are given by the chambers or senates as such, and not by the individual judges acting with the agreement of their colleagues. The name of the judge who gives the opinion of the court does not become known. The court acts impersonally as a court. Consequently, a dissenting judge has no opportunity to publish his opinion. When the chamber decides by a majority of its members to take a certain opinion, the dissenting judge has to accept this opinion and sign the decree even when he regards it as erroneous.

The capacity for the office of judge is acquired by a study of a course of law in the university of at least three years, after which an examination must be passed and the degree of *referendar* has to be acquired. The *referendar* is submitted to the discipline of governmental officials and is occupied during at least three years in the different courts, — the district court, superior court, and court of appeals; in the state attorney's office; in a lawyer's office; and, in many states, in the department of the executive. Thereafter a second examination has to be passed, by which the degree of assistant judge (Gerichtsassessor) may be acquired. The assistant judge is occupied in judicial positions during generally four to five years, receiving compensation for his services; and after that time he gets his appointment as judge. Every ordinary professor of law in a German university may be appointed judge. Other persons, however, cannot be appointed to the judicial office.[1]

The judges keep their appointments for life, and can be changed or removed only for certain reasons and under certain proceedings prescribed by law. All courts except the supreme court are state courts; all judges, state judges. But the law used by them and the procedure in which they use it are with few exceptions uniform for the whole empire.

The non-contentious jurisdiction, so far as it is acted on by the courts, is almost exclusively performed by the district courts. All

[1] *Cf.* Court Organization Act, §§ 1 *et seq.*

other kinds of courts act only on appeal. There are different denominations for the district courts in regard to their functions in matters of non-contentious jurisdiction, like the land registration office (Grundbuchamt), the guardianship court (Vormundschaftsgericht), the probate court (Nachlassgericht), etc., but this is merely a matter of nomenclature and does not mean that the district courts have different functions or special procedure in regard to such business.

The jurisdiction of a district court in a given matter is not regulated by general rules; it depends on the character of the transaction. The domicile of the person whose interests are in question generally establishes the jurisdiction. The procedure is analogous to that in contentious civil matters. But all forms of restrictions in contentious matters are here more or less abolished. The German contentious procedure is ruled by two fundamental maxims. It must be oral and public. This means that the court is only permitted to know what has been communicated to it orally. Information by writing is not, in principle, taken into consideration. And all oral communication must be made in open court, in public. Neither principle is applied to non-contentious jurisdictional matters. Here the judge takes any information that he regards necessary and the proceedings are not open to the public. Applications by individuals are made in writing or by declaration before the clerk of the court. In contentious matters the action of the court generally depends upon a petition of the parties. In non-contentious jurisdictional matters the question whether the courts will act of their own motion (*ex officio*) or only on application depends on the character of the given matter. When public interests prevail, as in matters of guardianship or administration, the court acts *ex officio* and cites the parties. Other acts serving merely the interest of individuals, like registration of land and the recording of marriage agreements, are done only on application.

In regard to evidence the German procedure has not so many restrictions and rules as exist in this country; the court may regard what are treated in the English law as irrelevant facts and hearsay when they are deemed important. Of course there are certain rules, especially in criminal procedure, but they are very few compared with the English system. In non-contentious jurisdictional matters the judge is free and acts without restrictions. The statute says: "the court has *ex officio* to take any evidence

which it deems fit for the ascertainment of the given facts."[1] For this purpose every district court in Germany is obliged to respond to a request made to it by any other court.[2] Accordingly it is apparent that the judges, in performing functions of non-contentious jurisdiction, have a great deal of freedom. On the other hand, their responsibility is greater here than in contentious matters. The general rule of the law is that any person who wilfully or negligently without legal reason injures the life, body, health, freedom, property, or any other right of another, is bound to compensate him for any damage arising therefrom.[3] This rule has been modified in favor of the courts in contentious matters as follows: if an official commits a breach of his official duty in giving judgment, he is not responsible for any damage arising therefrom unless the breach of the duty is punishable with a public penalty to be imposed by criminal proceedings.[4] But in matters of non-contentious jurisdiction the law says that if an official wilfully or negligently commits a breach of an official duty incumbent upon him as to a third party, he shall compensate the third party for any damage arising therefrom. If negligence only is imputable to the official, he cannot be held liable unless the injured party is unable to obtain compensation elsewhere.[5] In both cases, contentious as well as non-contentious, the duty of an official to make compensation does not arise when the injured party has wilfully or negligently omitted to obviate the injury by making use of a legal remedy.[6] Because of their liability for negligence it is not unusual in Germany for the officials charged with non-contentious jurisdiction, especially land registration, to take out insurance for their protection.

The decrees in matters of non-contentious jurisdiction may be referred to the superior court on appeal. In the higher courts the whole procedure is nearly exclusively in writing and in chambers. The decrees of the superior court given on appeal can be referred to the courts of appeal, but only when a violation of law is alleged to have been committed by the superior courts, and not for errors in fact. This appeal for error of law is, in Prussia, not referred to the different courts of appeal, but exclusively to the court of appeal in Berlin (Kammergericht). In Bavaria, these appeals go exclusively to the court of Munich.

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[1] Non-Cont. Jurisd. Act, § 12.
[2] *Ibid.* § 2.
[3] Civ. Code, § 823.
[4] *Ibid.* § 839, al. 2.
[5] *Ibid.* al. 1.
[6] *Ibid.* al. 3.

The decrees of the courts of appeal in matters of non-contentious jurisdiction are final. The supreme court has generally no opportunity to give its opinion in this branch of law, but there is an important exception showing how in the modern German law the customary or common law is developed by statutory provision. The court of appeal to which a matter of non-contentious jurisdiction has been referred for an alleged error in imperial law is not allowed to deliver an opinion different from what has been given before by another court of appeal or by the supreme court. If this opinion seems erroneous, the court of appeal sends the records to the supreme court, asking it to decide.[1] This statutory provision may appear to have sometimes a curious result, because the opinion of a higher court in a given matter binds the lower court only in that matter, and the lower courts are not prevented from following subsequently a different rule if persuaded that the opinion of the higher court given in a previous matter is wrong. The courts of appeal cannot do this, but must ask the supreme court to decide.[2]

IV. PRINCIPAL SUBJECTS OF NON-CONTENTIOUS JURISDICTION.

1. *Registration of Real Rights.* The German law of real property is governed by the following rules:

(*a*) Every parcel of land held as private property has a separate folio in the land register of the district in which the land lies. Several parcels belonging to the same owner may be registered under the same folio. Each folio has three separate divisions: the first for the registration of ownership; the third for hypothecary or similar charges; the second for other encumbrances, *e.g.*, easements. No private real right exists, in principle, that is not registered. The person in favor of whom real rights are registered is presumed to be the owner of these rights.[3]

Registers of the kind provided by the Civil Code and the Land Registration Act do not at the present time exist in all districts of the German Empire, but proceedings for their introduction have been begun. Judicial officers are appointed for that purpose, holding their terms in the districts where the registers are to be intro-

[1] *Cf.* Non-Cont. Jurisd. Act, § 28. A similar provision exists in contentious jurisdictional matters. Court Organization Act, § 137.

[2] Germany has, today, 1942 district courts, 176 superior courts, 29 courts of appeal, and the supreme court in Leipzig. Statistisches Jahrbuch für das deutsche Reich, 1907.

[3] Civ. Code, § 891; Land Registration Act, §§ 3, 4, *et al.*

duced, citing all owners of real rights as known to them by tax registers, maps, old ownership registers, or any other information, to appear before them to declare their rights and show their titles and other evidences. After these proceedings are finished, public notice and individual citation is given and evidence is taken, the land register is installed, and the person who failed to make appearance within the given period is precluded from making further application. If contests arise before the land registrar, he is not, of course, entitled to decide, because he acts as an officer of non-contentious jurisdiction, but the parties have to go to the ordinary courts. These contests, however, do not prevent registration; but when registration is made in favor of one party, any objection to its correctness (Widerspruch) taken by the other party is also entered upon the register. If the contest is subsequently decided by final judgment, the successful party may make an application to the land registration office to cancel the whole inscription or merely the objection to its correctness.[1]

(*b*) The transfer of ownership or the creation, modification, or release of a real right is effected by the combined operation of two acts; namely, a real agreement between the parties and the registration of this agreement.[2] Therefore a real right is not created when there is no registration, and, on the other hand, the registration does not create a real right when there was no agreement between the parties, or when this agreement was void for any reason. But the registration authorities are generally not bound to inquire into the existence or validity of the real agreement. They are, as a rule, entitled to make the registration when *the one party* whose right is to be encumbered, transferred, modified, or released, gives his consent. This consent can be declared before the judge or can be given in a written authorization duly acknowledged and proved.[3]

The judicial examination, before registration can be ordered, embraces the validity of the written instruments presented and all points regarding the personal capacity of the declarant. For instance, a guardian has to file his written authorization by the guardianship court, the heir has to file his certificate of heirship issued by the probate court, an agent has to present his document showing his powers of attorney in due form of law, etc.[4]

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[1] *Cf., e. g.*, Prussian ord. regarding land registration, Nov. 13, 1899, art. 29.

[2] Civ. Code, § 873. There are some exceptions in case of inheritance, compulsory sale, etc.

[3] Land Registration Act, §§ 19, 29.

[4] *Ibid.* §§ 36, 29, etc.

(*c*) In favor of a person who acquires a real right, the entries of the land register are deemed to be correct, unless an objection to their correctness is registered or the incorrectness is known to the acquirer.[1] In this point the German law of real property differs from the law of personal property. In the use of personal property the non-owner can transfer a good title to the *bona fide* acquirer when he gives him the possession, unless the thing has been stolen from the owner or has been lost; but this qualification is not applicable to transfers of money or of instruments payable to bearer or of things sold at public auction.[2] As regards real property even the thief may transfer a good title. Suppose, for instance, A wishes to give to B a mortgage on his land and prepares for this purpose his written consent to it and application for registration, duly acknowledged and proved, but later he does not come to an agreement with B; thereupon B steals the written instrument, and without A's knowledge takes it to the land registry office and, by showing A's written consent, gets the mortgage registered. B does not, of course, acquire any title, because real rights can be created only by registration and agreement, and here there was no agreement. But he may transfer his registered mortgage to a *bona fide* purchaser, and if this transfer has been registered, title to the mortgage is acquired by this person's reliance on the correctness of the land register.

To avoid this danger the Land Registration Act prescribes[3] that every inscription must be communicated to the owner and to all interested persons, but the owner and these persons may relieve the court of this duty in a given matter, and that is the common practice. If therefore, in the above illustration, A, in his written consent, had relieved the registration office from communicating to him the inscription of the mortgage, he would hear of the transfer by the thief to the *bona fide* purchaser only after the latter's registration, and so would have no opportunity to cancel the latter's rights.

It thus appears that the registration in many cases creates rights, even when there is wrongful act or error of an individual. If the mistake is made by the land registration officials, they are of course not entitled to correct their errors, and thereby to modify rights acquired by individuals relying on the accuracy of the land register, but the law provides that the judge, on discovering that a former mistake has been made in the registration of the land, shall inscribe,

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[1] Civ. Code, § 892. [2] *Ibid.* § 935. [3] Land Reg. Act, § 55.

ex officio, an objection to the correctness of the registration (Widerspruch von Amtswegen), thereby excluding *bona fides* after this objection has been registered.[1] This is all the officer can do. Later proceedings are in the hands of the interested parties, who are notified of the objection. They may bring a lawsuit for the cancellation of this objection or of the whole inscription, and the rectification of the land register can only be made after a judgment has been given or all parties agree.

The state is responsible to the individual for any defaults of the land registration officers in the performance of their duties. The officers are not directly liable to the individual, but they are compellable to reimburse the state for the amounts paid by the state because of their default.

2. *Matters of Guardianship.* As long as the father lives or the mother lives and, being a widow, remains unmarried, a guardian is not appointed except for special reasons. Therefore guardians as a rule are appointed for children both of whose parents are dead, or for illegitimate children. The guardianship court in all these matters acts *ex officio*. To enable the court to perform these duties, the registrars of births, marriages, and deaths, being administrative officers, are obliged by law to communicate to the guardianship court every case becoming known to them in which the appointment of a guardian is necessary.[2] The same duty is imposed upon the municipal orphans' councils, — local authorities created to assist the guardianship courts through their familiarity with localities and persons.[3]

The guardians are appointed by the court after they have taken oath of office, and letters of guardianship are granted to them. Generally the guardians do not have to give any security. There is no special need of this because they are continually controlled by the court. They have to file their accounts every year to be examined by the court, and there are a great many acts which they cannot do without special judicial authorization.

Analogous provisions are given for the appointment and control of guardians of insane persons, curators of absentees, curators of a posthumous child, and the like. The parents of minor children are not under control of the guardianship court; but in the management of their children's estates sometimes authorization by the court is prescribed.[4]

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[1] Land Reg. Act, § 54.
[2] Non-Cont. Jurisd. Act, § 48.
[3] *Ibid.* § 49.
[4] Civ. Code, §§ 1640 *et al.*

Besides this the guardianship court acts in many matters of a different character. Thus the court has power to grant to a minor over eighteen years of age the rights of a person of full age when it is for his best interests.[1] Adoptions must be ratified by the court.[2] When for certain purposes the husband needs the consent of his wife, or when the wife in the management of her own property needs the authorization of her husband, and this authorization in the one or the other case is refused for frivolous reasons, the court can give the authorization instead of the refusing party, thereby establishing the validity of the transaction in question.[3] Matters of this character are apparently contentious, and ought logically to be settled by lawsuit and judgment, but the German law prevents husband and wife from bringing their domestic quarrels of an unimportant or frivolous character before the open court and the public, and so makes the guardianship judge the legal adviser in domestic affairs.

3. *Functions of the Probate Court.* Letters of administration are not usually granted in Germany. In certain cases they may be issued, but this is exceptional. As the legal or testamentary heir directly continues the person of the deceased, the mere fact of the death makes him owner of the whole personal and real property, and the same fact makes him responsible to the creditors of the deceased. He may refuse to accept the succession by declaration in the probate court, which must usually be given within six weeks after his knowledge of the death. In such case the person who would become heir in case of the non-existence of the disclaiming heir immediately takes his place and continues directly the person of the deceased.[4]

The main functions of the probate court are as follows:

(*a*) Precautionary steps for the administration of the estate.[5] Before acceptance of the inheritance the probate court takes all necessary measures for the preservation of the estate. The same rule applies when the heirs are known, but it is uncertain whether or not they have accepted the inheritance. The court may, for example, order the affixing of seals, the lodgment of money, negotiable instruments, and valuables, the drawing up of an inventory of the estate, and it may appoint a curator for the person who may prove to be the heir. The local police authorities

[1] Civ. Code, § 3.
[2] *Ibid.* § 1741.
[3] *Ibid.* §§ 1379, 1402, *et al.*
[4] *Ibid.* §§ 1942 *et seq.*
[5] *Ibid.* § 1960.

must communicate to the court when it becomes necessary to take any provisional steps of the character mentioned.[1]

(*b*) Opening and publication of wills. Any person who has in his custody a testamentary disposition is bound immediately on the death of the testator to deliver the instrument to the competent probate court.[2] The court sets a day for the opening and publication of such will, and must summon the statutory heirs and any known beneficiaries for such date. The will is then opened and published. All the contents of the will regarding beneficiaries who were not present at the opening must be communicated to them.

The object of these proceedings is not to create any presumption in favor of the validity of the will. The publication is in order to make known the testamentary heirs and to bring the fact of their nomination to their knowledge, so that they may exercise their right to repudiate the succession within the prescribed period. If the repudiation is made, the court notifies the next heirs.

(*c*) Procedure on partition of estates among co-heirs.[3] In the Roman law, when disputes arose between co-heirs about the partition of the estate, the dispute was settled by a lawsuit.[4] The German law developed a procedure by which the probate court had to compromise between the contesting parties. Lawsuits were brought only when this attempt of the court was without success. Analogous provisions exist now in the modern German law. If the co-heirs cannot come to a private agreement in settling the estate, they cannot begin a lawsuit, but must make an application to the probate court. The functions of this court in the subsequent procedure are strictly limited to non-contentious jurisdiction. The court merely states the assets and liabilities of the estate and the rights and shares of the co-heirs and other interested parties. If the co-heirs come to an agreement, they sign it, and the court ratifies it, thus giving to it the force of a final judgment. But when contests arise, the court merely states the contentious points, which are then settled by a lawsuit; and the proceedings in the probate court with regard to these points can be continued only after judgment is given.[5]

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[1] *Cf.* Prussian Non-Cont. Jurisd. Act, art. 19.

[2] Civ. Code, §§ 2259 *et seq.*

[3] Non-Cont. Jurisd. Act, §§ 86 *et seq.*

[4] Actio familiæ herciscundæ, see Nussbaum, 124; 3 Dernburg, Pandekten, § 176.

[5] *Cf.* Statute introducing the Civil Code, art. 147. The functions of the probate

(*d*) Certificate of inheritance.[1] As above mentioned, administrators and testamentary executors are appointed only in exceptional cases, and the opening and publication of wills establishes nothing as regards their validity. On the other hand the land registration courts, when applications are made by pretended heirs, are obliged to examine into their legitimate rights, and when they register rights in realty in favor of wrong heirs the state becomes responsible for damages. Like duties are imposed upon savings banks, governmental officials who are asked for pensions of a deceased person, and the like. So there must be a way for these authorities to ascertain the right heirs. This is done by the certificate of heirship given as well to legal as to testamentary heirs by the probate court. The applicant for a certificate has to state the date of the testator's death, the relationship upon which his right of inheritance is based, whether any person excludes him from succession, or any will exists, and whether any action relating to his right of inheritance is pending. All these declarations must be given under oath and be justified by public documents; for instance, as regards birth, marriages, and death. The court takes all evidence necessary to ascertain the facts, and makes the co-heirs join the declaration of the applicant, and also swear under oath. When the court is convinced of the correctness of the alleged facts, it issues a certificate of heirship. The legal effect of this certificate consists in the presumption that the person who is named as heir in the certificate has the right of inheritance therein stated, and any *bona fide* person transacting business with the stated heir is protected. Therefore, when the certificate of heirship has been obtained by error or perjury, the wrong heir can transfer the title to a *bona fide* third person. Provisions are made to cancel the certificate when its incorrectness becomes known.

4. *Registration for Different Purposes.*

(*a*) Marriage contracts. Marriage in Germany has no effect upon the estate of the husband or the wife as to the title of property; but on the completion of the marriage the property of the wife becomes subject to the management of the husband, who takes the revenues of this property as a contribution for the

court of the last-described character are in nearly all German states more or less thoroughly performed by notaries who act to that extent as probate courts, with power and authority given by law.

[1] Civ. Code, §§ 2353 *et seq.*

maintenance of the family. Things intended exclusively for the personal use of the wife, like clothing, ornaments, and working implements, and various other things are exempt from the management of the husband, and remain the separate property of the wife. All personal property which is in the possession of the husband or of the wife, except the wife's personal outfit, is generally presumed to belong to the husband.[1]

The legal state of affairs can be modified at any time by marriage contracts between husband and wife; either wholly excluding the management of the wife's property by the husband or, on the other hand, creating a more or less complete community of property. The change of the legal state of affairs is made by the agreement and nothing further is necessary. But any third party, if *bona fide*, is entitled to assume that the statutory rule applies and is therefore protected, unless the modification or exclusion of the statutory régime is registered in the prescribed manner in the district court of the domicile of the husband.[2]

(*b*) Commercial matters. The German Commercial Code has the character of a special statute enacted on the basis of the Civil Code and amending or enlarging its provisions for the purpose of giving greater facilities for the transaction of purely commercial business. In so far, merchants, their agents, commercial partnerships, or share companies, may be regarded as a class favored by the law. On the other hand, persons taking part in commerce are subject to certain legal restrictions which do not exist in the general civil law. Merchants doing a large business must file the signature of their firm, with any further details, in the district courts where their main establishment or any branches are located. Powers of procuration given to commercial agents must be filed, and similarly commercial partnerships and share companies must be registered.[3] The purpose of this registration is to make known all persons and corporations engaged in commercial transactions, and to protect all persons who rely on the correctness of the commercial register. The registration of the share companies has even a greater effect. It creates the corporation. Persons neglecting to file their application for registration can be fined by the district courts.[4]

(*c*) Mines and ships must be registered in the district courts.

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[1] Civ. Code, §§ 1363 *et seq.*

[2] *Ibid.* § 1435.

[3] Commercial Code, §§ 29 *et seq*, 53, 106, 200, *et al.*

[4] *Ibid.* § 14.

Registration is governed by principles similar to those applicable to the registration of land.[1]

(*d*) Artistic models are only protected when registered in the competent district court.[2] The registration of patents and trade-marks is not done by the district courts but by the patent office in Berlin.[3]

The effect of registration, as shown above, varies in different cases and depends upon statutory provisions. Sometimes the registration creates a mere presumption of the existence of the registered rights or facts; *e. g.*, the registered owner or the stated heir is presumed to be entitled to his rights. Or the registration protects third persons who deal with the registered persons and rely on the correctness of the register; as in the case of the commercial or marriage register. This protection sometimes goes so far as to give to third parties a legal title where their grantor was registered without legal reason, as in the case of the land register or certificate of heirship. In this case the register is said to have public faith (öffentlicher Glaube). Or by registration the right is protected against violation or limitation, as in the case of artistic models. Or, finally, by registration, the right in question is created; as in the case of share companies, or of real rights which are created by the combined operation of agreement and registration.

All legal requirements have to be examined before the judge orders the clerk to make an inscription of the right in question. As we have seen, if negligent, the judge makes himself responsible.

5. *Judicial Authentication of Instruments.* Written statements are used in law for a double purpose: either to facilitate the proof of the facts therein stated, without the necessity of calling witnesses, (Beweisurkunden), or to create the validity of the stated rights which would be void if not made by instrument (dispositive Urkunden). This latter purpose of creating rights by written statements was unknown to the old Roman law, where documents were only used for proof; but in the Roman law after about the fifth century, instruments constituting rights came into use.[4]

Instruments are of two kinds: writings authenticated by public act and private writings. The origin of the first kind is to be found

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[1] Mines are regulated by state laws. *Cf.* Statute introducing the Civil Code, art. 67. As regards ships, see Statutes of June 22, 1899, June 15, 1895, *et al.*

[2] Artistic Models Copyright Act of Jan. 11, 1876, § 9.

[3] Patent Act of April 7, 1891; Trade Marks Act of May 12, 1894.

[4] Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde, 147, 61.

in the law of the Franks, where already the court, besides other officers, was invested with the power of authentication.[1]

The modern German law shows three kinds of instruments:

(*a*) Writings under hand (private Urkunden). The form of a written statement is necessary; *e. g.*, for the contract of suretyship, for the acknowledgment of debts, etc., which would be void without that formality. Witnesses, sealing, and delivery are usually not required for the creation of such rights.

(*b*) Writings acknowledged before a public official (öffentlich beglaubigte Urkunden). The law prescribes that some written statements be acknowledged before a judge or a notary. The acknowledgment consists of the statement given by the judge or notary that the signature of the instrument has been given or acknowledged in his presence. This form of written statement is generally prescribed for the purpose of inscription in public registers.[2]

(*c*) Instruments authenticated by public act (öffentliche Urkunden). The public act consists of declarations made before a judge or notary who takes the record of it. Therefore this authentication is not limited to the signature, but covers the whole transaction. This form is generally required for transactions relative to family relations or creating inheritance rights.[3]

The Civil Code in prescribing the form of public acts generally gives a choice between authentication by judge or by notary, but the states are entitled to give these functions to the notaries only,[4] and this has been done in many parts of Germany.

The foregoing description covers only the main functions of the district courts on matters of non-contentious jurisdiction, and does not claim to be complete. Besides this, the district courts act in contentious matters.[5] Their jurisdiction in criminal matters includes all police contraventions and a number of misdemeanors. In civil matters their jurisdiction generally depends upon the value of the object in question. At present their jurisdiction goes to the value of 300 marks, but a bill has been prepared which would enlarge their jurisdiction to the value of between 600 and 1200 marks.

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[1] Schroeder, Lehrbuch der deutschen Rechtsgeschichte, 255.

[2] Land Registration Act, § 29; Commercial Code, § 12 *et al.*

[3] *E. g.*, Civ. Code, §§ 1434, 2371.

[4] Statute introducing the Civil Code, art. 141.

[5] Court Organization Act, §§ 23, 27, 75.